88-772

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1988

CARA LYN LANDRETH, a minor,
by and through her Guardian Ad Litem,
JOSEPH Y. ORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where an infant has been injured by the medical malpractice of the government, and where the medical malpractice also spawns a legally cognizable conflict of interest in the infant's parents which would disqualify them from representing the infant in a claim for damages for such malpractice,

1. When does the claim accrue under the Federal Tort Claims Act for purposes of the statute of limitations under 28 U.S.C. Section 2401(b)?

2. Does a neutral guardian ad litem with no conflict of interest have to be appointed before the infant's claim accrues for purposes of 28 U.S.C. 2401(b)?

3. To bar the infant's claim, is it permissible under the due process and equal protection clauses to impute to and against her (1) the knowledge of her parents to begin the accrual of the claim and (2) their failure to file a timely claim?

4. Is there any rational basis for discriminating against the infant by imputing to the infant the knowledge of her parents and their failure to file a timely claim, when an adult in the same position would not be so disadvantaged?

5. Is the government constitutionally estopped from asserting the statute of limitations before a neutral guardian is appointed?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, which is reported, appears in Appendix A.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on June 23, 1988. Petitioner timely filed her Petition for Rehearing and suggestion for hearing *en banc* on July 7, 1988. The Ninth Circuit entered its order denying the Petition for Rehearing and rejecting the hearing *en banc* on September 26, 1988. On October 14, 1988 the Ninth Circuit granted Petitioner's motion to stay the

mandate to November 4, 1988. Petitioner filed her Petition for Writ of Certiorari within ninety days of the of denial of the Motion for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2401(b). Time for commencing action against United States.

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. 28 U.S.C. Section 2401(b)

STATEMENT OF THE CASE

This is a medical malpractice action arising under the Federal Tort Claims Act. It is brought by a minor plaintiff, Cara Lyn Landreth, through a non-parental guardian ad litem. The claim stems from events occurring at Plattsburg Air Force Base in New York when Cara was less than one year old.

On the morning of March 30, 1973, Cara's parents were negligent in "leaving medicine in the reach of children." As a result of the negligence,[1] Cara ingested an unknown amount of Quibron,[2] a prescription asthma

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[1]The United States admitted to such negligence in responses to requests to admit.

[2]Quibron is highly toxic at high blood serum levels, but its effects can be counteracted by anti-seizure medications.

medication taken by her mother, Jennie Landreth. Although her mother found her swallowing the medication in time to rush her to the base hospital, the Air Force failed to remove the Quibron from her system. The Air Force medical personnel also failed to keep her for observation to determine if she needed anti-seizure medication to counteract the Quibron. Instead, the military physician in charge, Dr. Bruce M. Smith, handed over her care to two "medical technicians" who were instructed by him to administer 15 cc's of ipecac, reassure the parents, and send them home. Eight to ten hours later, Cara went into seizures.

Cara was then rushed back to the base hospital and later admitted into Montreal Children's Hospital, where she was hospitalized for six days and then discharged as "normal." The discharge was without benefit of the results of an EEG, which showed abnormal brain waves.[3] For the next two years, while Cara's father remained in the Air Force, she was treated by the Air Force for learning difficulties and emotional problems. The Air Force failed to perform any neurological workup during the two years. The Air Force medical records state that the Quibron "ingestion resolved without obvious sequelae."

Petitioner alleges that the medical malpractice of the military physician, who abandoned her to take care of his car, negligently caused her to sustain permanent brain damage which was not identified and medically linked to the Quibron ingestion until 1977 or 1978. By that time, Cara's parents were divorced and Jennie Landreth

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[3]Cara's representatives did not even discover these abnormal findings until suit was filed, as the Air Force and the Landreths never received these findings until then.

had sole legal custody. Neither parent filed a medical malpractice claim on Cara's behalf.

The conflict of interest between Cara and her parents required that the action to be brought by a non-parental guardian ad litem, Mr. Joseph Y. Ore. As a matter of law, her parents would be liable for the results of the malpractice, since the law deems malpractice a foreseeable consequence of their negligence.

Cara, through her attorney, filed an FTCA administrative claim dated September 6, 1983 alleging the Air Force was negligent. The Air Force rejected the claim on May 15, 1984, finding the claim was time barred.

On November 7, 1984 the guardian ad litem was appointed for Cara and suit was filed in the district court. The complaint alleged, among other things, that barring her action by imputing to Cara her parents' failure to file a claim would violate due process and equal protection. Subsequently, the United States filed a motion for summary judgment. The district court held the suit was barred by the two-year statute of limitations under the FTCA, 28 U.S.C. Section 2401(b) and dismissed the action.

The Ninth Circuit Court of Appeals, in a split decision filed on June 23, 1988, affirmed the district court's ruling dismissing Cara's lawsuit. The majority held that Cara's claims were not "of constitutional proportion," and that the legally cognizable conflict of interest held by her parents neither prevented the fictional imputation of necessary knowledge to her to begin accrual of her claim, nor relieved her of the duty to file a claim within two years of that accrual.

REASONS FOR GRANTING THE WRIT

The judicial task below was to interpret 28 U.S.C. Section 2401(b) in a medical malpractice case involving a brain damaged infant, where the infant claimed that the government's malpractice caused both her brain damage and spawned a conflict of interest[4] between her and her parents. The resultant rulings are a dangerous precedent in that they fail to recognize that minors hold constitutional rights independent of their parents, and they unnecessarily deprive Cara of due process rights afforded to adults in the same situation.

The courts below *should* have found that the statute of limitations had not run for any of the following reasons:

1. The court's traditional role to interpret the law to prevent injustice, whenever possible, dictated a holding that Cara's claim was not time barred.

2. The due process clause prevented imputing to Cara any failure of her parents' to file a claim.

3. Since adults in Cara's position would not be time barred, and there was no rational basis under equal protection requirements for discriminating against Cara solely because of her minority status, the statute had not run.

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[4]See dissent, below; *Ash v. Mortensen*, 24 Cal. 2d 654 at 657 (1944); *Clark v. Halstad*, 93 N.Y.S.2d 49 (1949). Note that while the parents could seek indemnity from the United States under *Herrero v. Atkinson*, 227 Cal.App.2d 69 (1964), they are not assured of such indemnity. Additionally, Cara would not be able to prevent them from either defaulting on a complaint by her against them, force them to file against the United States, or forego a bankruptcy.

4. Cara's claim was clearly protected under the due process and equal protection clauses as "property"; hence her claims were of constitutional proportions and subject to constitutional protection.

5. The principles and analyses set forth in decisions of the United States Supreme Court, the Seventh Circuit and California Supreme Court dictated a ruling in favor of Cara.

Rather than accepting common sense and citing these compelling reasons for holding that the statute of limitations had not run, the majority denied all relief. In doing so, they violated well established principles set forth in Supreme Court decisions; disregarded a constitutional analysis accepted by the Seventh Circuit; ignored a unanimous holding by the California Supreme Court; and simply held that Cara's claim was not "of constitutional proportions." They found her parents' conflict of interest was of no consequence, and that, although they were not "unsympathetic to Cara's condition," they would not follow a sensible construction of the statute of limitations to avoid forfeiture of her claim.

As shown below, common sense and well established precedents dictate a reversal.

I.

THE HOLDING BELOW TRANSGRESSES THE TRADITIONAL ROLE OF THE COURTS TO AVOID INJUSTICE AND ABSURD CONSEQUENCES

One of the traditional functions of the courts is to construe statutes so as to avoid absurd or glaringly unjust results, foreign to legislative purposes. *Sorrells v. United States*, 287 U.S. 435, 450 (1932).

> "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Id.* at 446.

Although the majority below was sympathetic to Cara's condition, it compounded the injustice to her by depriving her of her claim for compensation for the permanent damage to her brain. This was done by holding that she had "slept on her rights." The Supreme Court has repeatedly found that the legislature intends exceptions to its language to avoid such results. Id. at 447-448. The holdings below represent a sharp departure from established tenets of statutory construction.

Instead of straining in an attempt to avoid injustice, the majority strained to fit this case into the statute of limitation rule in *United States v. Kubrick*, 444 U.S. 111 (1979) by holding through a *legal fiction* that Cara both knew of her injury and the cause thereof so that her claim accrued when *her parents* had this knowledge. The majority used the fiction of imputing her parents' knowledge and their delays to bar her action, ignoring the following venerated principle of law:

> "It seems to be a rule founded in common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong, but shall be used ut res magis valeat quam pereat, . . and this rule, so equitable in itself, seems recognized in the common law."
> *United States v. 1,960 Bags of Coffee, MD.*, 8 Crach 398, 415, 3 L.Ed. 602 (1814).

The rulings below could only have resulted from a failure to consider fundamental guidelines controlling the role of the courts.

II.

REVERSAL IS REQUIRED TO AVOID VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION OF MINORS

A. The Holding Violates Due Process.

The Supreme Court has repeatedly and without hesitation overturned statutes of limitations which it has determine violate the due process and equal protection rights of illegitimate minors. In a series of cases from *Mills v. Habluetzel*, 456 U.S. 91 (1982) to *Clark v. Jeter*, ___ U.S. ___; 56 U.S. Law Week 4527; 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988), the Court uniformly held that statutes of limitation which effectively apply against minors must now be scrutinized under heightened due process and equal protection standards. The rationale in those cases applies here.

Cara's due process and equal protection arguments are based on the fact that the lower courts' interpretation of 28 U.S.C. Section 2401(b) provides her with illusory due process at best, because it allows the statute to run against her, when her parents have a conflict of interest. Adults in the same position would not be so disadvantaged.

The Seventh Circuit recently analyzed a similar circumstance involving the running of the statute of limitations for filing a minor's claim in bankruptcy. *In re Chicago, Rock Island and Pacific Railroad Company*, 788 F.2d 1280 (7th Cir. 1986). There the minor argued that the statute should be tolled during his minority. In marked contrast to the majority opinion below, the court felt compelled to address the due process issue, since *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31, (1982) expressly treats a cause of action as

"property" within the meaning of the Constitution's due process clauses. In a situation strikingly similar to the case at bar, but where there was no conflict of interest, the court held that the minor's due process rights were not violated, since he was represented by his mother. The following language by Judge Posner is instructive:

> "Granted, for the government to create a right of action but then erect an insuperable barrier to its being vindicated by a particular class of claimants, such as minors, might in some circumstances be so unreasonable as to raise questions of due process - but not in the circumstances of this case. Dyche is content with a rule that requires the minor to sue during his minority, provided only that the court appoints a guardian ad litem; and we think the parent who has custody of the minor (Dyches's mother, in this case - she was either divorced from his father or widowed, the record does not show which, but in any event she had remarried and had custody of Dyche) is a constitutionally adequate substitute, *so long as there is no showing of a conflict of interest.*" Id. at 1281-2 [Emphasis added].

Cara falls within the caveat enunciated by Judge Posner, since she had a governmentally created right of action with an insuperable barrier consisting of her minority and the parental conflict of interest with her parents "erected" by the government's malpractice.

B. The Holding Violates Equal Protection.

Adults in the same position as Cara would be afforded Due Process and would have their claims tolled during their disability, when their injuries and disabilities are caused by the government's medical malpractice. In

Washington v. United States, 769 F.2d 1436 (9th Cir. 1985), *Zeidler v. United States*, 601 F.2d 527 (10th Cir. 1979), *Pardy v. United States*, 575 F.Supp. 1078 (S.D. Ill. 1983), and *Dundon v. United States*, 559 F.Supp. 469 (E.D.N.Y. 1983), the courts uniformly held that adult victims of malpractice, who could not know and appreciate their injury and the cause thereof, would not lose their claims under 28 U.S.C. Section 2401(b) during the term of their disability, even though a spouse or relative could have been appointed as a conservator or guardian ad litem to file a claim for them. Because of the conflict of interest clearly established in the record below, *Cara was in a position no different than the adults in these cases.* There is no rational basis for discriminating against her, just because she is a minor.

C. The Holding Below Conflicts with Holdings of the Supreme Court, The Seventh Circuit, and the California Supreme Court

The case involves such a departure from well-rooted jurisprudential doctrines and cardinal principles of statutory construction, that it must be overturned, or else it will serve as authority for permitting the use of fictions to interpret a statute, resulting in injustice and absurdity, even when the ultimate purpose of the statute is not likely to be served.

The task below was to construe 28 U.S.C. Section 2401(b) in a manner consistent with the Constitution.

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be

avoided." *Crowell v. Benson*, 285 U.S.22, 62 (1932).

While the Court may not pervert the purpose of a statute or judicially rewrite it, federal statutes are to be so construed as to avoid serious doubt of their constitutionality. *Commodity Futures Trading Comm's v. Schor*, 478 U.S. 833, 841 (1986). When they cannot be so construed, they are declared unconstitutional. Hence, the Court has found it necessary to hold as void, statutes of limitation as long as six years for determining paternity *Clark v. Jeter, supra.* Cara does not seek such a drastic remedy, but only a holding that where there is a legally cognizable conflict of interest between parent and child, and where the conflict arises from the acts giving rise to the claim, the statute is tolled until a neutral guardian ad litem is appointed. Cara could not file a claim for herself during her minority; this had to be done through a guardian ad litem or friend. Holding that Cara's rights and the filing of the claim by a guardian ad litem were retroactively barred by her parents' failure to file a claim smacks of the type of anomalous retroactive time bars repudiated by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 at 107-8 (1971). A ruling against Cara would be a ruling that she had "slept on her rights" when through no fault of her own she could not have known of the time limitation and could not have filed a claim. Moreover, visiting the failures of her parents on her would be unjust and would not comport with fundamental conceptions of justice. *Plyer v. Doe*, 457 U.S. 202 (1981).

> "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relation-

> ship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent."[5] *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (footnote omitted).

The Seventh Circuit's analysis in *In re Chicago, Rock Island and Pacific Railroad Company*, 788 F.2d 1280, *supra*. would compel a ruling in favor of Cara. So would the unanimous ruling by the California Supreme Court in *Young v. Haines*, 41 Cal.3d 883 (1986). There the court found that it would be constitutionally impermissible to interpret a statute of limitations against minors by denying them the benefit of tolling afforded to adults in malpractice cases. The court did not hesitate in rejecting, under due process and equal protection principles, a literal reading of the statute which would have so discriminated against minor plaintiffs. *Id.* at 888-9.

D. The Purpose for 28 U.S.C. Section 2401(b) is Not Necessarily Advanced by the Ruling Below.

If the court's decision is not reversed, Cara will be forced to sue her parents for negligence. This is an onerous condition for vindicating her rights. It may or may not result in her parents bringing in the United States on a third party claim for indemnity.

Under both California and New York law, Cara's parents would have the right to an action for indemnity

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[5]In this case, "deterring" parents from delaying the filing of a claim could result in their being found totally liable for the entire claim. This potential conflict of interest would nullify of any such deterrence.

against the government. *Herrero v. Atkinson*, 222 Cal. App. 2d 69 (1964); *Clark v. Halstad*, 276 A.D. 17; 93 NYS 2d 49 (1949). This cause of action would permit Cara's parents to seek total indemnity against the government for the malpractice performed on Cara, for which they would be legally liable. *Id.* It is settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through payment. *People ex. rel Dept. of Transportation v. Superior Court*, 26 Cal. 3d 744 at 751 (1980). The rule applies to governmental tort claims against the United States. *Chicago Rock Island & Pacific Ry. Co. v. United States*, 220 F2d 739 (7th Cir. 1955). Hence, the provisions of 28 U.S. § 2041(b) would not bar an action for indemnity.

Given the law of indemnity and given the fact that the statute of limitations has not yet accrued on an indemnity action by Cara's parents, Cara could seek indirect relief from the government by suing her parents. That action is tolled until she reaches majority. Cal. C. Civ. Proc. § 352. An action against her parents, however, would be an abhorrent condition for enforcing her rights, especially given the already strained circumstances between the family members. Certainly, an unjustified application of a legal fiction should not be used to force her to sue her parents, she can *indirectly* avoid 28 U.S.C. § 2401(b).

CONCLUSION

Petitioner submits that the Court should grant a hearing on this matter to harmonize *United States v. Kubrick*, 444 U.S. 111 (1979) with the due process and equal protection rights of Petitioner.

Respectfully submitted,

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CARA LYN LANDRETH

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARA LYN LANDRETH, a minor, by and through her Guardian Ad Litem, JOSEPH Y. ORE,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 86-5732
D.C. No. CV-84-8618-LEW
OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted
March 7, 1988—Pasadena, California

Filed June 23, 1988

Before: Jerome Farris and Stephen Reinhardt, Circuit Judges, and Howard D. McKibben,* District Judge.

Opinion by Judge McKibben; Dissent by Judge Reinhardt

SUMMARY

Governmental Torts

Appeal from judgment dismissing a suit under the FTCA as

*Honorable Howard D. McKibben, United States District Judge, District of Nevada, sitting by designation.

time-barred. The court affirmed holding that Cara's claim was not timely filed nor was the statute of limitations for filing the FTCA claim tolled until a guardian without a conflict of interest appointed.

In 1973, appellant Cara Landreth swallowed her mother's quibron medication. Doctors failed to pump the child's stomach. In 1977 or 1978, a brain scan determined that Cara had suffered brain damage as a result. During 1979, Jennie, Cara's mother, told a doctor that Cara's problems were partially attributable to her ingestion of quibron. The Air Force rejected Cara's administrative claim in 1984, finding the claim time barred. Later that year, a guardian ad litem was appointed for Cara and suit was filed in district court. The district court found that suit barred by the two-year statute of limitations under the FTCA and dismissed the action.

[1] A tort claim against the United States must be filed within two years after the claim accrues. In a medical malpractice case under the FTCA, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause. [2] The record supports the district court's finding that Cara's parents knew or should have known of their daughter's injury and its cause no later than 1979. [3] Nevertheless appellant argues that Jennie Landreth may have been partially responsible for Cara's injuries. Therefore, appellant maintains both Jennie and William Landreth, her parents, had a conflict of interest in pursuing this claim. Appellant contends the statute of limitations for filing the FTCA claim was tolled until a guardian without a conflict of interest was appointed for Cara. [4] In this case, more than ten years elapsed between the alleged negligent acts of the government and the filing of the administrative claim. It is precisely this type of delay the limitation provision of the FTCA was designed to guard against. Principles of equity cannot be invoked to toll the accrual date of plaintiff's injury for statute of limitations purposes.

The dissent argues that the majority not only decides Cara's constitutional claims prematurely; it also brushes over the fundamental constitutional questions by relying on a case in which no cognizable conflict of interest existed.

COUNSEL

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Shari Silver, Assistant United States Attorney, Los Angeles, California, for the defendant-appellee.

OPINION

MCKIBBEN, District Judge:

Plaintiff, Cara Lyn Landreth, by her guardian ad litem, appeals from a judgment dismissing her action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* We affirm.

I. FACTS AND PROCEDURAL POSTURE

During the morning of March 30, 1973 Cara Lyn Landreth, who was then eleven months old, swallowed a portion of her mother's quibron medication. Her mother, Jennie Landreth, and her father, William Terry Landreth, who was a member of the United States Air Force rushed her to the Plattsburgh Air Force Base Hospital. No physician examined Cara at the emergency room. Jennie Landreth heard a physician instruct an orderly to give Cara 15 cc. of ipecac and then send her home. The ipecac was administered and the Landreths returned home. That evening Jennie noticed Cara's eyes had rolled back and she was convulsing. Cara was immediately

taken back to the Plattsburgh hospital by her parents. She was then transferred to the Montreal Children's Hospital where she remained hospitalized for six days. The medical personnel at the Montreal hospital told the Landreths that Cara's seizures were due to the quibron ingestion and that her stomach should have been pumped at the Plattsburgh hospital when she was first taken there.

When Cara was fifteen months old, Jennie noticed she was easily angered and had temper tantrums. At eighteen months Jennie noticed Cara's communication skills were retarded. A base doctor in the Philippines where William was stationed recommended that Cara be examined by a specialist.

In 1977 or 1978, Jennie took Cara to the UCLA Neuropsychiatric Institute where a doctor performed a brain scan on Cara and determined she had suffered brain damage as a result of the ingestion of quibron.

Prior to 1979 both William and Jennie Landreth frequently discussed their belief that the Air Force was responsible for Cara's problems because the doctors failed to pump Cara's stomach on the morning she consumed the quibron.

During 1979 Jennie told a doctor at the UCLA Neuropsychiatric ward that Cara's problems were partially attributable to her ingestion of quibron.

Plaintiff filed an administrative claim dated September 6, 1983 under the FTCA alleging the Air Force was negligent. The Air Force rejected the claim on May 15, 1984, finding the claim was time barred.

On November 7, 1984 a guardian ad litem was appointed for Cara and suit was filed in district court. The United States filed a motion to dismiss and for summary judgment. The district judge trifurcated the statute of limitation issue from the issues of liability and damages. After argument, the district

court held the suit was barred by the two-year statute of limitations under the FTCA, 28 U.S.C. § 2401(b) and dismissed the action.

Cara Landreth appeals, contending that (1) her parents did not know or have reason to know of the existence of facts establishing the government's responsibility for her condition until a period within two years of the filing of her claim, or (2) the statute was tolled until a guardian ad litem, without a conflict of interest, was appointed to represent her.

II. DISCUSSION

[1] Under 28 U.S.C. § 2401(b), a tort claim against the United States must first be presented to the appropriate federal agency within two years after the claim accrues before a negligence suit may be instituted. Failure to do so is a jurisdictional defect. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The date on which a claim accrues is determined by federal law. *Washington v. United States*, 769 F.2d 1436, 1438 (9th Cir. 1985). In a medical malpractice case under the FTCA, a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause. *See United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979); *Colleen v. United States*, No. 86-4232, slip op. at 3870 (9th Cir. April 1, 1988); *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981). Plaintiff need not be aware that an actionable claim exists as long as she is aware of the injury and its probable cause. *United States v. Kubrick, supra.*

The district court's grant of summary judgment is reviewed de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Review is governed by the same standard used by the district court under Fed. R. Civ. P. 56(c). *Id.* We must determine, viewing the evidence most favorable to plaintiff, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant sub-

Pittman court, in considering and rejecting this argument, said:

> Appellant also bears down heavily on the father's earlier supposed conflict of interest which may have led him to subordinate and thus pass over the interest of the son. Again, on this argument we think the congressional intent is that the Congress just did not want stale claims lying around under the Federal Tort Claims Act.

341 F.2d at 741-42. The *Pittman* court also rejected the due process and equal protection claim, stating:

> Plaintiff contends that roughly 40 percent of the nation's population is under the disability of minority and that to deprive them of rights (because of the possibility that no adult will initiate proceedings) violates due process and equal protection when adults can go vindicate their own rights. We find no cases supporting such a proposition.

341 F.2d at 741.

The FTCA is a limited waiver of sovereign immunity. The purpose of the two-year limitation provision of Section 2401(b) is to encourage the expeditious disposition of claims. As the Supreme Court stated in *United States v. Kubrick*:

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

444 U.S. at 117 (citations omitted).

[4] Here more than ten years elapsed between the alleged negligent acts of the government and the filing of the administrative claim. It is precisely this type of delay the limitation provision of the FTCA was designed to guard against. While the court is not unsympathetic to Cara's condition, principles of equity cannot be invoked to toll the accrual date of plaintiff's injury for statute of limitations purposes. *Washington v. United States*, 769 F.2d at 1439; *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985). Congress has clearly manifested its intent that there must be prompt disposition of FTCA claims. This court does not, as the *Pittman* court did not, find the plaintiff's claims to be of constitutional proportion. Therefore it should be left to the Congress and not this court to provide for the tolling of the statute if policy considerations suggest that it should do so.

For the reasons set out above the court concludes that this action is barred under 28 U.S.C. § 2401(b).

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I dissent because I believe the majority has erred in its treatment of appellant's constitutional claims.

The quibron that caused Cara's brain damage and resultant seizures and behavioral problems was prescribed for the treatment of her mother's asthma. On the morning of March 30, 1973, when Cara swallowed the quibron, Jennie Landreth had left her unsupervised and had also left the quibron within her reach. Under New York law,[1] Cara could have had an

[1]Since the Landreths were residents of New York at the time of Cara's injury, the allegedly negligent acts occurred in New York, and the medical personnel practiced in New York, New York law governs this case. *Washington v. United States*, 769 F.2d 1436, 1438 (9th Cir. 1985).

action for negligence against her mother. *See Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1961) (eliminating defense of intrafamilial immunity for nonwillful torts).[2] Moreover, in any malpractice action brought on Cara's behalf, Jennie could have been subject to a counterclaim or to indemnification. *See Goedkoop v. Ward Pavement Corp.*, 51 A.D.2d 542, 378 N.Y.S.2d 417 (App. Div. 1976) (action for injuries sustained by infant as result of blasting cap explosion; court allowed counterclaim against infant's father for indemnification, alleging father negligently maintained blasting caps in basement).

Appellant argues that her parents had a conflict of interest because of their own potential liability and that, as a result, the statute of limitations on her FTCA claim could not begin to run until a neutral guardian ad litem was appointed for her. She contends that to let the statute run while the power to assert her claim lay solely with her parents deprives her of her due process and equal protection rights. These are important constitutional claims; yet the majority disposes of them unnecessarily and without meaningful consideration.

The majority relies exclusively on our holding in *Pittman v. United States*, 341 F.2d 739 (9th Cir. 1965). *Pittman* involved an accident which occurred on a Navy installation. The victim, nine-year-old Mark, argued on constitutional grounds that minority should toll the FTCA statute of limitations; we rejected that argument. *Id.* at 741. Mark further argued that his father, a Navy lieutenant commander, had a conflict of interest "because he feared litigation involving his own branch of the service might prejudice his advancement,"

[2]New York does not recognize a cause of action for negligent parental supervision. *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). However, an action against Cara's mother alleging that she negligently left the medication within Cara's reach would have been allowed. *See Goedkoop v. Ward Pavement Corp.*, 51 A.D.2d 542, 378 N.Y.S.2d 417 (App. Div. 1976) (allowing action against injured infant's father for negligently maintaining explosives).

and that he therefore delayed filing the action on Mark's behalf. *Id.* We disposed of that argument in two sentences, noting simply that "Congress just did not want stale [FTCA] claims lying around." *Id.* at 741-42.

There is no indication in *Pittman* that Mark's conflict of interest argument was based on constitutional grounds, or that we rejected it on those grounds. For that reason alone, the majority errs in relying on that case. But even if we read *Pittman* as a constitutional holding on the conflict of interest question, it would be distinguishable. Mark's father allegedly delayed bringing suit because he feared prejudice to his naval career. There is a difference, however, between speculation about possible damage to career goals and direct financial liability. The former may be a practical reason for avoiding litigation, but not all practical concerns rise to the level of a conflict of interest. When the possibility of harm is as remote and tenuous as it was in the case of Mark's father, it is not sufficiently serious to constitute a conflict—and, thus, to overcome the policy favoring prompt disposition of FTCA claims. Here, by contrast, Cara's mother faced the prospect of direct financial liability were she to file a claim on Cara's behalf. Thus the difficult constitutional issues Cara raises cannot be considered settled by *Pittman.*

The existence of a direct conflict of interest on her mother's part may, as a matter of law, have precluded Cara from having a fair opportunity—the opportunity an adult in her circumstances would have—to file an action against the allegedly negligent medical personnel who treated her. Thus, Cara may have been deprived of her due process and equal protection rights. However, we need not, and should not, resolve these constitutional issues here. The Supreme Court has directed us to avoid deciding such questions before it is necessary to do so. *Kolender v. Lawson,* 461 U.S. 352, 361 n.10 (1983); *Mills v. Rogers,* 457 U.S. 291, 305 (1982). In this case, there remain factual and legal questions, the answers to which may make it unnecessary for us to decide Cara's con-

flict of interest claim. Specifically, the government argues that even if Jennie was potentially liable for Cara's injury, Cara's father Terry Landreth was not, and that he could have brought the action on Cara's behalf. We cannot judge the validity of this argument without knowing whether, under New York law, Terry was financially liable for Jennie's negligence; when Terry and Jennie were divorced; and whether Terry had the authority to file an action on behalf of Cara subsequent to the divorce. The majority proceeds to reject Cara's constitutional claims without waiting for this information. Because it may be that Cara's claims can be disposed of on narrower grounds, the majority's decision violates an established tenet of judicial review. Cara's action should be remanded to allow the district court to make the factual and legal determinations that would have permitted a resolution of the government's non-constitutional argument.

Cara suffers from permanent brain damage which may be traceable to one or both of two causes: her mother's negligence and the negligence of the Air Force medical personnel who treated her. Despite the potential liability of her parents, the majority relies on them to vindicate Cara's claim and, in effect, holds Cara responsible for their failure to do so. As a consequence, Cara may be deprived of her due process and equal protection rights—a result that cannot be justified by invoking Congress' desire to resolve FTCA claims promptly. The majority not only decides Cara's constitutional claims prematurely; it also brushes over the fundamental constitutional questions by relying on a case in which no cognizable conflict of interest existed, and a holding that was not based on constitutional grounds. I would remand Cara's action for resolution of the factual and legal issues described above. I therefore respectfully dissent.

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State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 4, 1988, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 4, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)